

**Before the
Federal Communications Commission
Washington, D.C. 20554**

MAY 27, 2016

In the Matter of)
Protecting the Privacy of Customers of Broadband) WC Docket No. 16-106
and Other Telecommunications Services)

COMMENTS BY ROSLYN LAYTON¹

These comments reflect my academic research in the field of internet policy and my career experience in the online advertising industry. I work in a university engineering department where we teach privacy technologies as well as telecom regulation. My colleagues and I have the benefit to study privacy practices around the world, and we are frequently engaged in the question of how to develop best-practice privacy regulatory frameworks. Moreover, in teaching telecom regulation, we have a responsibility to instruct students in the standards of conduct for an expert, independent telecom regulator. In addition, as a Visiting Fellow at the American Enterprise Institute, I have followed the FCC's effort to impose Title II on the Internet, knowing that reclassification would give the FCC jurisdiction over broadband providers' privacy practices, wresting it from the Federal Trade Commission.

Prior to academe, I worked in the analytics software industry. I served as a subject-matter expert in online marketing² and had the benefit to consult with a number of companies around the world about their challenges with online advertising, particularly paid search in Google.

Internet advertising was a \$50 billion industry in the US in 2014³, on track to double by 2019. Its revenue exceeds that from ads on broadcast and cable TV by 25 percent. The Internet Advertising Bureau tracks⁴ growth of the industry driven primarily by the sale of ads in search, display, and on mobile platforms. A single company emerges as the overwhelming winner: Google. Over two-thirds of searches in the US are performed in Google, and Google takes the lion's share of advertising revenue. Facebook collected about one quarter of total *display* advertising revenue⁵, about \$5 billion in 2014, but was followed closely by Google at \$3 billion. In the \$19

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² See my book co-authored with Andreas Ramos. *KPIs for Search Engine Marketing*, McGraw-Hill, 2009.
<http://andreas.com/downloads/kpi-ebook.pdf>

³ Tim Peterson, "Digital to Overtake TV Ad Spending in Two Years, Says Forrester" *Advertising Age* (2014)
<http://adage.com/article/media/digital-overtake-tv-ad-spending-years-forrester/295694/>

⁴ "IAB internet advertising revenue report" PricewaterhouseCoopers, April 2015,
http://www.iab.net/media/file/IAB_Internet_Advertising_Revenue_Report_FY_20142.pdf

⁵ Trefis Team, "U.S. Digital Advertising Landscape And Key Players (Part 2)" *Forbes* (2015)
<http://www.forbes.com/sites/greatspeculations/2015/07/09/u-s-digital-advertising-landscape-and-key-players-part-2/#47faa7673eda>

billion mobile advertising market in 2014, Google earned 37 percent of the revenue. Globally, Google earned \$44 billion on advertising on its websites in 2014.⁶

This current paradigm of internet advertising is based upon a keyword bid and pay-per-click model. This model is very granular, enabling relevant ads to appear next to highly specific search queries, but it requires a high level of skill and budget to be successful. Many small and medium-sized advertisers frequently don't participate because it is too expensive and complex, and their businesses lack the scale to take advantage of such platform technology. However, as the users move toward the *mobile* Internet, search and advertising are changing, creating opportunities for new players to add value.

Users express a number of privacy and security concerns about the pay per click current model, so much so that they have started to deploy ad-blocking technology as a form of digital self-defense. In addition, advertising consumes about 20-40 percent of a user's broadband subscription. Therefore, finding a way to reduce advertising, or to deploy it more efficiently, can lower the user's cost of broadband.

Broadband providers also suffer under the current model, as advertising is frequently ill-designed, creating traffic disturbances in the network and embedded increasingly with malware. Unwittingly, the FCC Open Internet rules make it more difficult for broadband providers to manage their networks under these constraints. Even if they are protecting their users, broadband providers risk running afoul of the FCC's draconian rules.

Advertising is a form of communication to help promote goods and services. It is an important part of America's economy and is protected under free speech. However, advertising has always evolved, and this trend should continue into the next generation of the Internet. For example, to deliver content across America's media networks, advertising was deployed in radio, television and print to subsidize the cost of network. Importantly this has reduced the cost to the end user. The opposite path was taken in Europe where governments required users to buy licenses to watch television instead of allowing advertisements. The difference could not be more stark. The US became the world leader in the media industry whereas Europeans only began to enjoy multiple TV channels a generation ago, subsidized by advertising.

Advertising has also been a crucial input for the freemium model of internet content, underwriting the cost of services so that users can access them for free or reduced rates. Now it is time to use advertising to lower the cost of user's broadband connections. This is the next logical development, and one that will not only allow new content providers to enter the market, but close the digital divide for to those for whom a broadband is too expensive.

Compared to the current keyword bid model, broadband providers offer a substantially different advertising model. It is more transparent, secure, and private than the reigning model. In the new advertising model, the advertiser and content provider are frequently one in the same. In general, the content provider, whether a health insurer, automaker, realtor, or any kind of small or medium-sized business that wants to support a set of content, pays for the data of that content. The user's bill is thus reduced. The connection to the advertiser/content provider is direct and transparent, unlike the current model where many feel the advertiser to be an interloper.

⁶ Annual Report for the fiscal year ended December 31, 2015, Alphabet Inc./Google Inc., (2016)
https://abc.xyz/investor/pdf/20151231_alphabet_10K.pdf

The transaction is more secure because the ad-serving technology is deployed from the broadband provider's network where malware is effectively screened out. Finally, the user accesses the content while under a contract with a broadband provider, an agreement which has a higher degree of trust than the terms of service currently employed by ad servers.

The emergence of new forms of advertising should be encouraged, not regulated by the FCC. This response explains the following points and concludes that the FCC's effort to regulate broadband privacy is highly misguided, protecting current Internet companies from competition—and worst of all, will deter competition and innovation that consumers and advertisers deserve in ad serving technologies.

My concerns from this FCC proceeding are:

1. The proposed regulations effectively protect existing providers of online advertising from much needed competition and erect unnecessary and unjustified barriers to entry in an oligopolistic market.
2. The proposed regulations deny consumers and advertisers much needed competition and technological innovation in ad-serving technologies.
3. The proposed rules perpetuate damaging and distortionary regulatory asymmetry which is untenable in the converged world of communications, content, and computing. In the digital age, there is no reason why broadband providers should be regulated differently than other actors in the digital ecosystem. Consumers expect a seamless digital experience. This should be bolstered by a standard set of consistent, ex-post competition-enhancing rules for all applications, services, and providers.
4. The proposed rules create needless complexity and bureaucracy to access services from broadband providers, actors which are already overregulated. Opt-in and Opt-out regimes are illusions of privacy protection. Fundamentally consumers should be able to choose from different forms of payment and information exchange, facilitated by the competition and innovation in the ad-serving platform business. Opt-in and opt-out regimes add costs to business and consumers, but serve the FCC to create a superficial artifact to regulate. This does not add value to consumers, the economy, or society, but rather imposes a perverse regulatory cost and further cements the FCC's control over the Internet.
5. The claim that the FCC's privacy regulations will protect consumers cannot be supported. It appears that the FCC is engaging in a deceit, either willfully or unintentionally, to profess that it will protect consumers when its objective is to protect incumbent advertising platforms. In fact, consumers are likely to experience harm as a result of the regulations, thinking that the so-called protections apply to the entire online experience, when they only apply to a small part. Thus they are likely to proceed to use non-broadband provider ad-supported online services, thinking that they are now regulated by the FCC.
6. There is compelling evidence that the Democrat-led FCC conducts this process as a tribute to a leading party donor, Google. The company happens to be the world's largest online ad provider and stands to benefit materially if the regulations which the FCC has proposed are implemented.

Background on why I submit this NPRM

I worked for a number of years with software and analytics tools for online marketers. These technologies are used by enterprises worldwide to manage and measure their activities on the Internet. I consulted with many companies on their online advertising strategies and supervised a group of professionals to perform online advertising campaigns. My group, on account of its ad spending, was one of Google's largest accounts and received considerable attention and training from the company in how to use the platform.

There is no doubt that Google advertising worked very well for some companies to achieve leads and sales through advertising. Google advertising is particularly beneficial for large established firms which have previously developed brands offline. Alternatively, those firms which were willing to make significant investments (e.g. \$50,000 per month or more along with the appropriate expertise) could, over time, earn a return on their advertising spend. But it concerned me that a single firm could gather so much power over information and subsequently accumulate advertisers' dollars.

A related issue is the degree to which many small and startup companies struggle to achieve advertising success with Google. Findability in the search engine requires extensive budget not just for paid search but the murky world of search engine optimization. Companies frequently hire consultants and agencies for such a task. However, Google can make a change to its algorithm, resulting in traffic and rank disappearing overnight. There is a tremendous need for a more transparent, predictable experience for the advertiser.

In addition, Google gives preference to websites which already have more traffic, so this has the perverse effect of strengthening the destinations that are already strong.⁷ Google's CFO Patrick Pichette made a joke at an investors event about "feeding the winners and starving the losers" with regard to business lines within Google,⁸ but this idea also applies to the company's advertisers. Those advertisers that do well are rewarded; those that don't, are punished. In practice a large number of advertisers try and leave Google, but there are few options for other advertising platforms that deliver similar scale and reach.

This problem will only be exacerbated by recent changes Google has made to its platform.⁹ Beginning in February 2016, Google phased out the traditional list of ads on the right side of the page. Instead, Google now puts only a couple of ads at the top of the page which look similar to "natural" search results. Users click on the ads, frequently not knowing they are ads.

The right side of the page is used for Knowledge Graph results which provide the most authoritative informative result for the search query (frequently a Wikipedia entry, though this is not to say that Wikipedia is unbiased and objective), and for Product Listing Ads, which are generally consumer products from well-known brands and companies. These changes have the impact of increasing competition for bids, which increases the bid price and Google's revenue. It also forces out the small advertisers, those which can't afford higher bids and don't have the time or skills to operate the complex AdWords engine. To its credit, Google now offers an automated version of its ad engine for small business, but at least one agency advises against using the platform, citing that the benefits of the platform don't scale down.¹⁰

Google has perpetuated a myth that marketing online is easy,¹¹ that one can just set up a website, place some ads, and traffic will appear magically. The truth is that it is extremely difficult to market online. Many small and

⁷ Andreas Ramos, "Can We Just Build It and They Will Come?" *andreas.com* (2015), <http://blog.andreas.com/?s=build+it>

⁸ Own Thomas, "Google CEO hints at future: "Starve the losers"" *Gawker* (2008) <http://gawker.com/5064903/google-cfo-hints-at-future-starve-the-losers>

⁹ Andreas Ramos, "No More Right Side Ads at Google." *andreas.com* (2016) <http://blog.andreas.com/index.php/no-more-right-side-ads/>

¹⁰ Andrew Lolk, "Does AdWords Express Sabotage Small Business Owners Before They Even Get Started?" *White Shark Media* (2016) <http://blog.whitesharkmedia.com/adwords-express-sabotages-small-business-owners>

¹¹ <http://blog.andreas.com/index.php/can-we-just-build-it-and-they-will-come/>

medium sized advertisers want alternatives to Google. That's why working with broadband providers, new entrants and small-medium sized companies is a natural fit. Indeed, many of the companies that want to take advantage of such programs are not big brands or household names.

Advertisers describe their challenges with Google in SearchEngineLand.com and SearchEngineWatch.com, but some are afraid to go public with the problems encountered with Google for fear the retribution from the giant, which could result in lost traffic and revenue. In any case, a number of academics have documented their concerns about the company.¹²

This is not to say that occasionally startups succeed to make a valuable business proposition and become financial successes. But the reality is that online marketing requires a continual effort to improve one's Internet properties to be findable by Google. For every successful startup, there are hundreds, if not thousands, of firms that tried and failed.

To be sure, it is not necessarily Google's responsibility to ensure the viability of startups, but the company is a unique and important position to control the way that users find startups and information in general. It is thus the proverbial "gatekeeper." Rather than regulate Google, I would offer that allowing competition from different sectors and technologies is the way to solve the market concentration problem. Thus advertisers and consumers would have choice that they desperately lack today.

But regulatory distortions make a world of free competition impossible. Unfortunately the FCC's proposed privacy regulation slows much needed market entry into the online advertising industry and protects the incumbent provider Google. It is fitting that the FCC conducts this proceeding under the Open Internet Order if only to display its grotesque and egregious capture by Google, the company that has defined and leveraged the concept of net neutrality to promote its ad-driven business model.¹³

It's no surprise that the ultimate in Internet behemoths such as Google and Netflix would like regulatory focus to fall on other parts of the ecosystem. Google is a company that has much public goodwill and reputation riding on the notion of the "neutrality" of its searches, and hence has become the leading supporter of "net neutrality." But as Google's human quality rater manual¹⁴ exhaustively demonstrates, Google's technology is not neutral at all. It is highly subjective and biased. Moreover, the platform is continually optimized to maximize the shareholder value of Google.

¹² See: Chris Hoofnagle, "Beyond Google and evil" *First Monday* (2009) <http://firstmonday.org/article/view/2326/2156>,

Joseph Turow, *Media Today: Mass Communication in a Converging World* (Routledge, 2013),

Serge Egelman, "Android Permissions Remystified: A Field Study on Contextual Integrity" (Presented at PrivacyCon, Washington D.C., January 14, 2016)

https://www.ftc.gov/system/files/documents/public_events/776191/part_2_privacycon_slides.pdf,

Siva Vaidhyanathan, *The Googlization of Everything and Why You Should Worry* (University of California Press, 2012)

¹³ Brendan Sasso, "Netflix Has Replaced Google as the Face of Net Neutrality" *The Atlantic* (2014)

<http://www.theatlantic.com/politics/archive/2014/09/netflix-has-replaced-google-as-the-face-of-net-neutrality/456822/>

¹⁴ John Paczkowski, "Google and the Evolution of Search I: Human Evaluators" *All Things Digital* (2009)

<http://allthingsd.com/20090603/google-and-the-evolution-of-search-scott-huffman/>

When I learned of the concept of net neutrality in 2008, I found it laughable. No company or advertiser I had ever worked with complained about a broadband provider blocking or throttling its content, even in 2009 when America's broadband speeds reached their lowest speeds versus the rest of the world, according to Akamai. However, my clients did express many complaints about Google. Such issues included cost, difficulty to conduct campaigns, and the control of one company over the ecosystem.

In effect, a call for neutrality of the ecosystem clearly supports the position, to an overwhelming degree, that the status quo should be maintained. This protects the market share and monopoly revenues of a single provider, Google. Moreover, the very malleability of a concept such as net neutrality allows it be deployed for the policy "crise du jour", which is currently privacy. This serves Google with the ability to assert the concept at any point where its business model could face a competitive challenge, including the prospect online advertising offered by broadband providers and competing Internet companies.

My research of net neutrality regulations across 50 countries shows that Google is deeply involved in many of the efforts to promulgate net neutrality regulations, either through its direct lobbying or by funding various non-profit and social organizations to advocate on its behalf. It is not a coincidence that Google's traffic, revenue, and market share have all increased in step with the proliferation - and indeed - toughening of net neutrality regulations. This observation of regulatory capture has been described and documented by Nobel Prize winner George Stigler among other notable scholars. In an article written over twenty years ago on "Reflections on Professional Responsibility in a Regulatory State" the authors observe, "an agency that has been rendered obsolete by exogenous changes in the form of technological development or new marketplace developments will find that it must provide favors to discrete constituencies in order to preserve some measure of support for its continued existence."¹⁵

Net neutrality, as benign as it sounds to some, has created perverse outcomes. Rather than heralding a world in which there is vibrant competition amongst edge providers (the very premise of the regulations and Tim Wu's manifesto), the world of edge providers is increasingly concentrated and lacks competition. In fact, Google has leveraged the net neutrality concept to insulate itself from the very competition the Open Internet is supposed to create. By supporting bans of zero rating and sponsored data, Google succeeds to squash any would be edge provider competitor.

This was the situation which played out in India as Google-funded activists succeeded to ban not only Facebook's efforts in the country, but any Indian company that would dare to use differential pricing to compete against incumbents. A month after the ban was announced, Google launched a \$4 Android smartphone. Paradoxically, the very Google-funded activists who decried the poor being shown advertisements from Facebook (even though Free Basics shows no ads) have no problem with advertisements shown by Google.¹⁶

It appears that the reason there has not been meaningful antitrust action against Google is because the company helped elect President Barack Obama.¹⁷ Recent reports about the company have noted more than 400 meetings¹⁸

¹⁵ Jonathan Macey & Jeffrey Miller. Reflections on Professional Responsibility in a Regulatory State. Yale Law School Legal Scholarship Repository, 1995.
http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2445&context=fss_papers

¹⁶ No Internet for Poor People <https://nointernetforpoorpeople.com/> accessed May 27, 201

¹⁷ "Google Transparency Project", <http://googletransparencyproject.org/>

between the company and the President at the White House¹⁹, along with dozens of “revolving door” hires in which Google employees work in top positions in the Obama administration or vice-versa.²⁰ Many, including the *Wall Street Journal*, have observed the inappropriate influence of the company both at the White House and FCC.²¹

The FCC’s proposed privacy regulations are not best practice regulation. From an academic and technical perspective, the assumptions and designs of the rules are deeply flawed. The FCC conducted this rulemaking as a consequence of the authority it received as part of Title II reclassification. It might have had some merit if the FCC, on a proper timeline, had built a record of complaints and made a proper investigation of the practices and issues. Indeed, with a properly conducted, independent and evidenced-based case of the need to deter harm, the FCC could have asked Congress for the authority to regulate privacy. Instead the FCC has consistently avoided Congress, and presently the agency is in court for his third attempt to make rules to regulate the internet for which it has no authority. This FCC’s effort to regulate privacy - fittingly under the new Title II regime and hurriedly before President Obama is out of office - is yet another example of tribute the FCC pays to party supporters.

A proper academic and technical investigation of privacy points to a different direction for consumer privacy. In fact, it is market competition and technological innovation, not regulation, that improve privacy. This has been evidenced in the seminal work *Privacy on the Ground: Driving Corporate Behavior in the United States and Europe*. Authors Bamberger and Mulligan shows that while stricter regulations bring more compliance, they don’t support the embedded privacy practices which minimize data and reduce harm to consumers. In fact, it is in places where privacy regulations are ambiguous that companies take it upon themselves to innovate and improve their privacy practices, as a means to compete in the market. It is precisely because the ex-post FTC approach is less prescriptive that American companies outpace European firms on data and privacy protection.

The International Association of Privacy Professionals has reached similar conclusions. Their annual privacy governance report²² (a survey of privacy practices of 800 enterprises around the world) found that traditionally less-regulated industries have more advanced privacy practices while highly regulated industries conform only to the regulatory norm. Indeed, the FCC’s proposed regulations threaten to doom broadband providers to a lower standard of privacy protection. Such providers currently have an incentive to offer their service in a way that delivers advertising in better ways than Google. Any developments to these ends would be welcome to the millions of American consumers and advertisers who feel trapped by the Google monopoly.

¹⁸ not to mention any meetings such as fundraisers, private dinners etc taking place at other locations.

¹⁹ “Google’s White House Meetings” Google Transparency Project, Accessed May 27, 2016, <http://googletransparencyproject.org/articles/googles-white-house-meetings>

²⁰ “Google’s Revolving Door” Google Transparency Project, Accessed May 27, 2016, <http://googletransparencyproject.org/articles/googles-revolving-door>

²¹ Gautham Nagesh and Brody Mullins, “Net Neutrality: How White House Thwarted FCC Chief” *Wall Street Journal* (2015) <http://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522>

²² “IAPP-EY Annual Privacy Governance Report 2015”, IAPP, Accessed May 27, 2016, <https://iapp.org/resources/article/iapp-ey-annual-privacy-governance-report-2015-2>

There is not effective competition in the online advertising Industry. The FCC’s proposed regulations will strengthen Google’s position in online advertising.

As the FTC describes, “Effective competition in America is about price, selection, and service.”²³ If we look at the market for internet advertising, this is not the case in the US today. Advertisers face increasing bid prices for keywords;²⁴ the selection of ad serving platforms are limited;²⁵ and Google has a poor reputation for customer service, apart from its very best advertisers,²⁶ though Google has made an effort to improve.²⁷ The FCC’s proposed rules are in conflict with addressing the situation because they stymie the entry of new providers into the online advertising market, namely broadband providers. Having little to no competitors, Google is able to increase bid prices significantly above marginal cost. Having more providers in the marketplace would change some of these dynamics.

The online advertising market has become highly concentrated through numerous mergers and acquisitions in the ad-serving technology industry, as well as the massive shift of advertising spend from offline to online. The reality is that much of the technology running in the background is owned and operated by just a few large entities. The Google content network is a perfect illustration. It is a platform technology underpinning millions of websites and news outlets. To be sure, the ability to serve an ad across millions of digital destinations is beneficial for the advertisers; this is associated with enhanced tracking and targeting capabilities. However, this scale is also a concern for privacy advocates.²⁸

The other major issue is the change in allocation of advertising budget. Advertisers have increasingly diverted their ad spending away from offline channels, preferring to target online channels instead. This is largely due to the better tracking and analytic abilities available with online channels.

To put the online advertising industry into perspective, some US-based statistics from the Internet Advertising Bureau’s 2015 Internet Advertising Revenue Report²⁹ illustrate the importance of the industry:

“Compared to other major broadcast media types, the internet has experienced the most significant growth over the last 20 years. 2015 marks the twentieth year that advertising has been sold on the internet.

²³ “Competition Counts” US Federal Trade Commission, Accessed May 27, 2016, <https://www.ftc.gov/sites/default/files/attachments/competition-counts/zgen01.pdf>

²⁴ Mark Ballard, “AdWords Brand CPCs Rising? Here’s Why And What You Can Do About It” *Search Engine Land* (2015) <http://searchengineland.com/adwords-brand-cpcs-rising-heres-can-225648>

²⁵ Described in the next section

²⁶ Allen Cheung, Comment on “Why is Google so abysmally bad at human-based customer service?” *Quora* August 26, 2010, <https://www.quora.com/Why-is-Google-so-abysmally-bad-at-human-based-customer-service>, <http://searchengineland.com/why-does-the-smartest-company-in-the-world-have-the-dumbest-customer-service-139356>

²⁷ Micah Solomon, “Google Customer Service Steps Into The Spotlight” *Forbes* (2014) <http://www.forbes.com/sites/micahsolomon/2014/05/05/google/#255f3162621f>

²⁸ “Online Tracking and Behavioral Profiling” Electronic Privacy Information Center, Accessed May 27,2016, https://epic.org/privacy/consumer/online_tracking_and_behavioral.html

²⁹ “IAB internet advertising revenue report” PricewaterhouseCoopers, April 2016, <http://www.iab.com/wp-content/uploads/2016/04/IAB-Internet-Advertising-Revenue-Report-FY-2015.pdf>

Internet advertising continued to be the leading source of advertising revenue in 2015. Internet has continued to grow in share and significance when compared to other U.S. ad-supported media. Internet advertising revenue now represents 90% of all Television (Broadcast and Cable) advertising. In 2013, Internet advertising exceeded Broadcast Television. In 2011, Internet advertising surpassed Cable Television.

The Internet Advertising Bureau report continues, displaying the increase in online advertising concentration:

“Top 10 companies commanded 75% of revenues in Q4 2015. Online advertising continues to remain concentrated with the 10 leading ad-selling companies, which accounted for 75% of total revenues in Q4 2015, slightly higher than the 71% reported in Q4 2014. Companies ranked 11th to 25th accounted for 9% of revenues in Q4 2015, a slight decrease from the 11% reported in Q4 2014. Despite the emergence of a few heavyweights in internet advertising publishing, the concentration of top-10 revenue has remained relatively unchanged over the past ten years, fluctuating between 69% and 75%.”

Further, eMarketer has reported³⁰ the dominance of Google in both a US and global perspective:

“this year, eMarketer predicts, 30.9% of net digital ad revenues will go to Google. Facebook will be in second place with 12.0%. Google’s lead is even stronger as a share of worldwide net search ad revenues, at 55.2%. Google also takes in a third of all mobile internet ad revenues in the world, and mobile is helping to power the company’s overall ad revenue growth rate. This year, for example, Google’s net worldwide mobile internet ad revenues are expected to rise more than four times as fast as its ad revenues overall. By 2018, mobile ad streams will still be growing nearly twice as quickly as the total.”

“YouTube also figures significantly in Google’s worldwide ad revenue growth. Net ad revenues at the video site were up 40.6% last year, and will continue to grow by 21.1% this year—more than twice the overall growth rate for ad revenues at Google. YouTube revenues are growing more quickly in the US than elsewhere in the world, and are accounting for a larger share of Google’s ad revenue stream there each year. This year, eMarketer forecasts, YouTube will continue 10.8% of Google’s net US ad revenues, up from 9.1% last year. By 2018, the end of our forecast period, that share will rise to 12.4%.”

A look at Google’s 2015 annual financial report³¹ is telling. Google earned \$45 billion in 2014 and \$52 billion in 2015, strictly from its website advertising. Additionally, Google posted revenues of \$14.5 billion in 2014 and \$15 billion in 2015 from Google Member Networks websites advertising. It is not just the revenue and market share of Google that is a concern, but rather its ubiquity. Google’s share of presence on the top 100 websites has

³⁰ “Google Ad Revenue Growth to Drop to Single Digits This Year” eMarketer, April 20, 2016, <http://www.emarketer.com/Article/Google-Ad-Revenue-Growth-Drop-Single-Digits-This-Year/1013853>

³¹ Supra reference

increased from 74 in 2012 to 92 in 2015.³² Google tracking infrastructure is present on 92 of the top 100 most popular websites, and on 923 of the top 1,000 websites, providing Google with a significant surveillance capability online.³³

The Google domination story continues even beyond online advertising. According to ComScore, Google's Android operating system commands 53% of the worldwide mobile market³⁴ and Google was 64% of desktop search.³⁵ As of this writing, Google's Chrome web browser accounts for 56.75% of all usage³⁶, and Gmail scores with 56.4% of US websites using mail technology.³⁷

For as ubiquitous as Google seems in the United States, it is even more so abroad where the company enjoys even higher market share. In the EU, Google has grown by taking advantage of European tax havens. Thus, while Americans may be proud of the pre-eminence of the company, it also comes at a cost. The firm practices financial arbitrage to ensure that it pays the minimal amount of tax and revenues are not repatriated to the US. This is a key point of difference with broadband providers which must operate in the US and follow all American tax laws.

When looking at the facts about America's online advertising industry, the narrative that America's broadband industry is somehow uncompetitive and poses a threat to online companies is a joke. The reality of competition is the opposite. America's broadband industry has a more equal distribution of market share across players (and increasingly so), whereas in online advertising, revenue is increasingly concentrated with one company, Google.

America's broadband industry is growing more diverse with new networks and providers. As of this writing, the CTIA notes the following³⁸:

- The U.S. has the most facilities-based providers out of any nation, and one of only two countries in the world with five or more licensees per market.
- There are 191 facilities-based mobile providers in the U.S., along with numerous resellers/mobile virtual network operators. More than 90 percent of U.S. consumers have a choice of four or more wireless carriers, depending on the area. In urban areas, a majority of consumers have a choice among 14 providers.

³² Ibrahim Altaweel and Nathaniel Wood, "Web Privacy Census v 3.0" (Presented at PrivacyCon, Washington D.C., January 14, 2016) https://www.ftc.gov/system/files/documents/public_events/776191/part_1_privacycon_slides.pdf

³³ IBID

³⁴ Elizabeth Weise and Edward Baig, "Apple, Android, BlackBerry phones: What can't be hacked?" *USA Today* (2016) <http://www.usatoday.com/story/tech/news/2016/02/26/apple-android-blackberry-phones-what-cant-hacked/80935692/>

³⁵ "comScore Releases August 2015 U.S. Desktop Search Engine Rankings" comScore, September 16, 2015, <http://www.comscore.com/Insights/Market-Rankings/comScore-Releases-August-2015-U.S.-Desktop-Search-Engine-Rankings>

³⁶ "Global Stats" StatCounter, Accessed May 27, 2016, <http://gs.statcounter.com/>

³⁷ "Email Providers market share in United States" Datanyze, Accessed May 27, 2016, <https://www.datanyze.com/market-share/email-providers/United%20States>

³⁸ "Competition" CTIA, Accessed May 27, 2016, <http://www.ctia.org/policy-initiatives/policy-topics/competition>

- The U.S. is the least concentrated mobile wireless marketplace, with the lowest Herfindahl-Hirschman Index (HHI)³⁹ of 28 OECD countries.

Additionally, The FCC's annual wireless competition reports have been tracking the sector for some time. The 18th Annual Mobile Wireless Competition report⁴⁰ published at the end of 2015 observes:

“Mobile wireless services are an essential part of Americans’ daily lives. Mobile handsets are no longer used only for voice communication, email, social networking, and web browsing, but are increasingly used as hubs for entertainment, mobile commerce, home automation, and to connect other personal devices such as smart watches, fitness trackers, and health monitors. Further, mobile wireless serves a critical role in public safety, enabling users to summon lifesaving help, receive timely alerts, and access pertinent information. These developments have made mobile wireless one of the most important sectors in the national economy.”

The FCC report also confesses that “consumers view various mobile voice, messaging, and data services as interchangeable with one another” and that competition in the mobile industry has led “to lower prices and higher quality for American consumers, and producing innovation and investment in wireless networks, devices, and services”, but the FCC refuses to deem the mobile wireless market “competitive.” This is likely for political reasons, as it would undermine the Democratic FCC Commissioners’ calls for increased regulation of mobile operators.

Even with wireline broadband subscriptions *declining* in the US as people switch to mobile technology, the FCC refuses to accept wireless as a substitute. This is another political calculation, for if they accepted that people consider a wireless connection as acceptable for broadband, then the FCC’s claims for the need to regulate wireline broadband would be undermined too.

The proposed privacy regulations are falling on heavily regulated broadband providers—and wresting the enforcement function from the capable and relevant agency, the FTC. It is illogical that stricter requirements should be demanded of broadband providers when they are creating competition in an oligopolistic market where incumbents face only ex-post regulation. The entrance of broadband providers into the online advertising industry should be celebrated and supported, not regulated.

³⁹ “Herfindahl-Hirschman Index” US Department of Justice, Accessed May 27, 2016, <https://www.justice.gov/atr/herfindahl-hirschman-index>

⁴⁰ “18th Mobile Wireless Competition Report” Federal Communications Commission, December 23, 2015, <https://www.fcc.gov/document/18th-mobile-wireless-competition-report>

Broadband providers offer a different kind of advertising product which is a potential source of innovation and competition in the online advertising market. It could benefit users and advertisers, particularly small and medium-sized advertisers. This entry should be encouraged without distortionary, asymmetric FCC regulation.

The prevailing model of internet advertising is based on a complex set of bidding for keywords and other categories of information. This has the advantage of offering highly tailored and targeted transactions between users and advertisers. But this same technology is also engendering a sense of “creepiness”, that the technology is extremely intrusive and granular.

The proposed model by broadband providers is quite different. There is no keyword bidding. Rather the advertiser or content provider designates a set of content to be subsidized. The advertiser is then billed based upon the users who click on the content. From an advertiser perspective, it is a simple, turn-key, indeed even low-tech solution. It does not require the advertiser to have paid search expertise or a large budget. Advertisers can get started for as little as \$100. Two examples follow which illustrate the what broadband providers are offering is not exactly sponsored data, but rather reimbursed data, as content providers are reimbursing consumers for the cost of data consumption. In this exchange, content providers get to share their information and they do so in a way that reduces the user’s cost to consume the information.

AT&T’s Sponsored Data offers⁴¹ is to “sponsor digital experiences”. Eligible sessions on the user’s device are identified by a “sponsored data” icon⁴² and the sponsor’s brand. The program offers the opportunity for consumers to access (all or portions of) the mobile web and mobile apps at no charge. Data charges eligible for the sponsorship are billed directly to the sponsor.

Verizon FreeBee⁴³ is a sponsored content program summed up in the slogan “See the Bee, click and it’s free.” A small bee icon is shown next to sponsored content to let the consumer know that they can access the particular content without data charges. The sponsor’s brand will also be shown to the customer. The current content offered through the program includes video clips, audio streaming, app downloads, and mobile websites and apps. Every time a user clicks the content, the sponsor is charged a fee.

The AT&T product was launched in January 2014; Verizon’s was launched earlier this year. These programs still have to prove that they are viable. It remains to be seen whether they can even create competition for the established Internet companies. To date, their revenue is miniscule, and the advertisers are not household names. There is no need for proactive regulation by the FCC at this point.

⁴¹ Jerry Weber, Ron Chowdhury, and Harjot Saluja, “AT&T Sponsored Data” AT&T Slide Presentation (2015), <http://pre-developer.att.com/static-assets/documents/events/2015-developer-summit/Increasing-Mobile-Reach-with-Sponsored-Data.pdf>

⁴² Sara Kaufman, “Ovum’s innovative service of the month: AT&T’s sponsored data” Ovum. March 19, 2014, <http://developer.att.com/static-assets/documents/sponsored-data/ovum-att-sponsored-data.pdf>

⁴³ “FreeBee Data” Verizon Wireless, Accessed May 27, 2016, <http://freebee.verizonwireless.com/business/freebeedata>

The benefits and advantages of advertising delivered by broadband providers

Aside from the benefits of greater competition and user choice, there are some distinct advantages for broadband providers to engage in new forms of content facilitation. For one, delivering advertising from the network offers a more secure experience and significantly reduced risk of malware. Edge provider advertising may be infiltrated with “malvertising”, the malicious practice of embedding malware within legitimate advertising (or even running parallel to legitimate advertising⁴⁴), which can infect users’ systems without even clicking on the ads. For some users, this aspect alone would be a reason to switch to advertising delivered by broadband providers.

Advertising delivered from the network offers better network utilization. The sheer volume of ads and their poor design create disturbances in network traffic flows, adding further to congestion and operators’ traffic management challenges. While blocking unwanted content at the end-user’s device is the method of today, it is not ideal. The actual suggested practice of implementing fine-tuned firewalls and network access-lists is to block at network boundaries⁴⁵, as close to the content source as possible⁴⁶. Such configuration saves network capacity used by data that will be discarded at the customer device. In wireless networks, saving capacity also results in saving scarce spectrum for the customers’ actual desired use. The resulting efficient utilization of network capacity makes for better user experience. Finally, traffic flow disturbances can also be security events (such as denial-of-service attacks). Thus network refusal of misbehaving traffic is most effective as close to the source as well. It is clearly evident that the most effective data refusal solutions are implemented at the network level. Indeed, the FCC’s Open Internet regulations even further hamstringing the ability of operators to manage the traffic which is carrying poorly designed data consumers don’t want.

In many internet business models, the advertiser is the third wheel, that player which Google thinks is the most relevant sponsor for the particular query. There is frequently the issue that the advertiser is an interloper. In a broadband provider model, the content provider itself is the advertiser, and thus the consumer has more direct and transparent knowledge of the transaction.

User Perspective

Users have concerns about online advertising, particularly as it relates to prevailing model dominated by Google. In addition to the many issues related to privacy, there are also concerns about cost, security, and usability. Online advertising can consume up to 25% of a consumer’s mobile broadband data and 40% of video traffic⁴⁷, a large portion for something which consumers typically do not want and do not realize they are paying for. Many ads are poorly designed and not relevant. To the degree that such bad advertising proliferates reflects that the current paradigm has too few competitors with little incentive to improve; it is as if the current engines are being pushed to their limits to maximize views. Indeed, to the degree that this advertising can be reduced or better

⁴⁴ “Malvertising: When Online Ads Attack” Trend Micro, March 19, 2015,

<http://www.trendmicro.com/vinfo/us/security/news/cybercrime-and-digital-threats/malvertising-when-online-ads-attack>

⁴⁵ Karen Scarfone and Paul Hoffman, “Guidelines on Firewalls and Firewall Policy” *Special Publication 800-41 Revision 1*, National Institute of Standards and Technology (2009) <http://csrc.nist.gov/publications/nistpubs/800-41-Rev1/sp800-41-rev1.pdf>

⁴⁶ Wendell Odom, *CCENT/CCNA ICND1 100-101 Official Cert Guide* (Cisco Press, 2013)

⁴⁷ <http://www.sfu.ca/content/dam/sfu/snfchs/pdfs/Adblock.Plus.Study.pdf>

designed to consume less data would be a boon to consumers. Excessive advertising also can run down user-device battery life.⁴⁸

It is only natural then that people employ ad blocking as a form of digital self-defense. To be sure, ad blocking is an inferior solution. It would be better to have alternatives for a better advertising experience brought about by greater competition and innovation.

Essentially users are subsidizing ad delivery under the status quo. This is not how advertising is supposed to work. Advertising should reduce the end users' cost. To be sure, advertising is subsidizing Google's 200+ apps once the user is on the Google platform, but the user is in fact paying for those ads in the traffic costs of the broadband subscription. One can thus understand why the net neutrality concept is so important for Google. It obliges the end user to pay for the Google service as is - even though the advertising is a hidden cost in the intangible privacy perspective as well as the tangible perspective of the data it consumes. It is for that reason that Google wants all traffic to be priced equally. If users could choose for themselves, they would likely put a different value on advertising. Net neutrality is in effect "pure bundling" forcing the user to pay for all data, regardless of how she values it.

A more competitive, flexible system would let the user be in charge and let the user define where advertising is appropriate, and indeed, allow advertising to reduce or subsidize a variety of costs. Ideally for the user, she could enjoy advertising-supported Google platform experiences in addition to advertising-supported broadband access. As users enjoy zero rating or sponsored data in the form of free searches and social networking, they should also enjoy this in the provision of their broadband service. Indeed, a true free market would find that advertisers would compete for users' attention, to the point that the advertisers would pay (or reimburse the cost to the user) for viewing the advertisement and utilizing the service with which it is associated.

Such a market environment could play out in a number of consumer-centric ways. For one, the user could benefit by having the cost of broadband reduced if an advertiser is willing to sponsor some content. By the same token, some content and platform providers are willing to make some content available for free without any fee. In the same way that televisions aired public service announcements, broadband providers can provide certain public benefit content at no cost the end user (and without charging a fee to the content provider).

Another possibility is that users could pay for either ad-free or ad-supported Internet experiences. The price of broadband, rather being regulated by the FCC in volume and speed, could be flexible and consumer-centric. Possible solutions resulting in the consumer tailoring her online experience, deciding which data for which she wants to pay outright, which data is ad-supported, and which data is pro-bono. There is no reasonable argument establishing why a consumer should not be able to contract with a broadband provider for such experiences. Ideally the broadband provider would be allowed to provide both models, a pure "data by weight" model, or the model in which the user can regulate the amount of advertising that comes across the broadband connection. The broadband provider could then reimburse the relevant third party content provider and/or advertiser for that content which is consumed. To be clear, the current mode of mandating net neutrality by pricing all data the same is not the consumer-centric option; it is the Google-centric option.

⁴⁸ Thomas Claburn, "Blocking Online Ads May Save Energy" Information Week (2008)
<http://www.informationweek.com/e-commerce/blocking-online-ads-may-save-energy-/d/d-id/1074562>

The benefits of more competition in online advertising for consumers are numerous. For one, having choice in the marketplace is the optimal way for consumers to decide whether and how to consume online advertising and the services it subsidizes. The binary model of free services via sponsored content (Google), or fee-based solutions (user subscription or fee), is limiting. Consumers should have a third way; they should receive the tangible benefit of having a monetary reimbursement either as a rebate (lowered cost) to the broadband bill in exchange for consuming content or sharing personal data. As such, zero rating and sponsored data address provide this solution directly. Alternatively, consumers could also pay to receive advertising from preferred providers, depending on the content quality.

Broadband-provider-enabled models could allow the user to align her content preferences with her subscription; selecting a set of content and information tailored to her that would reduce the cost of her bill, or at least add no new charges for consumption.

Users have greater trust with their broadband provider than they do with most platform internet companies.⁴⁹ Trust is a sense of confidence and reliance in the integrity, strength, and security that one feels when using a digital technology. Its measure characterizes the environment for digital goods and services and is a function of the technology and practices of providers along with the institutions governing the system. To the extent that new services from communications providers can enter the market, such would help to alleviate some of the concerns consumers have about using services from the traditional internet companies.

Having alternatives from trusted communications providers would foster a better trust environment as well.⁵⁰ The key differentiator here is that consumers have a contract with broadband providers. With internet companies, users have only a loose term of service which can be changed at any time for any reason. Thus if consumers contract with broadband providers for some kind of content subsidization, the user is likely to have more trust in the service. It is precisely for this reason that broadband providers should be encouraged to enter the online advertising industry. The providers should not be burdened by asymmetric regulation, which results in deterring consumers from taking advantage of what prospects they could offer.

Advertiser perspective

As discussed, the trend in American advertising is the shift away from tradition offline channels to online channels. There is no doubt that the biggest brands and companies engage in a variety of advertising, but small and medium advertisers are frequently squeezed when engaging in online advertising. This is because many do not have the scale economy both online and offline to leverage working in a platform such as Google.

From the advertiser perspective, much of the ad spending will likely be additive. Many are first time advertisers, or ones that have given up spending in Google. So in that way the introduction of broadband provider advertising could expand the market without creating any revenue loss to Google.

⁴⁹ Lee Rainie, “The state of privacy in America: What we learned” *Pew Research Center FactTank* (2016) <http://www.pewresearch.org/fact-tank/2016/01/20/the-state-of-privacy-in-america/>

⁵⁰ Mary Madden and Lee Rainie, “American’s Attitudes About Privacy, Security and Surveillance” *Pew Research Center* May 20, 2015, http://www.pewinternet.org/files/2015/05/Privacy-and-Security-Attitudes-5.19.15_FINAL.pdf

Preferable Alternatives to the FCC Privacy Regulations

The FCC proposed privacy regulations offer a needlessly complex set of rules. As described by information scientists, opt-in and opt-out setting create an illusion of privacy and have detrimental economic impacts.⁵¹ For one opt-in/opt-out are not substitutes for the fundamental improvement in technology that can deliver information without compromising a person's privacy. These settings disrupt and restrict the free flow of information that is necessary for a system to work. Moreover, when users opt-out, the business must find a way to cover costs. That can take the form of increasing the tracking on the existing users as well as finding other means to target the customer. Thus the opt-in/opt-out regime is inferior to competition. It is likely that the FCC likes the option because it provides yet another superficial artifact to regulate, meaning the agency can assess fines for non-compliance, find new sources of negotiating power for the parties it regulates and other activities that do not add value to the society but instead serve to inure regulated companies to the regulatory.

As such, a return to the standard of ex-post privacy enforcement by the FTC is highly preferable. Ideally creating the necessary competition in the online advertising market requires the removal of the FCC Open Internet Order. Should the Circuit Court of Appeals rule against the FCC for a third time, there may be a window to remove this distortionary regulation and allow competition and innovation to emerge.

A tenet of classic telecom regulation is that a competitive market is always preferable to regulation.⁵² There is important research and development in privacy in the areas of communication anonymizers, limited disclosure technologies, virtual identities, anonymizing credentials, and data access management. Indeed, the FCC should offer a competition or prize for the winning solution, not regulate competitors out of the privacy solution space.

The FCC should support solutions that fundamentally improve data protection through technology. Regulation as implemented, regardless of how well-intended, is subject to human judgement and politics. To the degree that innovation can improve privacy technology, it is the preferable outcome. This is driving the idea behind "privacy by design"⁵³ - i.e., privacy is considered and built-in at every stage of a product's development - so that private data is protected against being compromised at multiple layers of the product. In fact, the mix of convoluted regulation, poor definitions, focus on compliance rather than innovation, and a preference for ad-hoc legal responses rather than fundamental reinvention are why privacy by design solutions are not more widespread. That is to say the FCC itself is "crowding out" the efforts to create new and better systems.

One example of a privacy by design technology is the Privacy Butler⁵⁴, an automated service that can monitor a person's online presence and attempt to make corrections based on policies specified by the owner of the presence. Similarly with online visualization tools detailing where their data goes, users can understand and better manage their personal data. Such a solution can also help Internet entities better explain and engage users in how and why data is needed. The new privacy economy paradigm offers tools and processes that introduce a

⁵¹ Fred H. Cate and Michael E. Staten, "Protecting Privacy in the New Millennium: THE FALLACY OF "OPT-IN"" *Privacy Briefing Book 2001* (Advisory Committee to the Congressional Internet Congress), (2001) <http://www.netcaucus.org/books/privacy2001/pdf/cate.pdf>

⁵² Colin Blackman and Lara Srivastava, *10th Anniversary Telecommunications Regulation Handbook*.

⁵³ "Introduction to PbD" Information and Privacy Commissioner of Ontario, Accessed May 27, 2016, <https://www.ipc.on.ca/english/Privacy/Introduction-to-PbD/>

⁵⁴ Ryan Wishart, Domenico Corapi, Anil Madhavapeddy, and Morris Sloman, "Privacy Butler: A personal privacy rights manager for online presence" (2010) <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.184.3721>

possibility of assigning value for a privacy exchange, wherein users could be financially compensated to share their information.⁵⁵

Nobel Economist George Stigler observed, “Regulation is acquired by industry and is designed and operated primarily for its benefit.”⁵⁶ It is understandable that a company such as Google wants to protect its business model and revenue, if need be by ensuring that competitors cannot enter its market. Tullock’s paradox further explains why it is worthwhile from Google’s perspective to attempt to win favor at the FCC and impose an asymmetrical regime on its potential competitors.⁵⁷ To protect its business model which delivers in excess of \$50 billion annually, Google is willing to support a large policy staff and dozens of special interest groups (so-called consumer advocacies) to convince the FCC and the public that broadband providers’ entry into the advertising industry needs to be regulated. Even if the fee is \$10 million, \$50 million, or \$100 million, it is worthwhile to Google ensure that users don’t spend their time on competing advertising platforms with content that is not enabled with Google tracking.

It appears that the imposition of Title II was pre-meditated by Google and a number of the organizations it sponsors precisely because of the reclassification of broadband would trigger the FCC’s privacy enforcement authority. Public Knowledge’s President and CEO discussed the need for the FCC to enforce the “social policy” of privacy at the Senate Committee on Commerce, Science and Transportation in January 2015.⁵⁸ In February 2016 his organization published a lawyerly attempt to explain that the FCC’s gymnastics are legal and why having double standards is somehow competition enhancing.⁵⁹ In January 2016 the Open Technology Institute published a preposterous paper “The FCC’s Role in Protecting Online Privacy: An Explainer”⁶⁰ purporting that broadband providers see into all activities of its users. Fortunately that paper has been discredited with an assiduous explanation by leading privacy expert Peter Swire.⁶¹

With this NPRM, the FCC attempts to promote rules to regulate broadband privacy under the ruse of protecting consumers. This response has discussed the highly concentrated online advertising industry and the increasing market share and revenue enjoyed by Google. It further explains that the real reason for the rules is to create barriers to entry to the online marketing industry, specifically to make advertising products and services from broadband providers more difficult and costly for consumers to use through a convoluted opt-in/opt-out scheme. The effect of such rules will be to retard the competition and innovation that consumers and advertisers demand for alternative ad-serving information platforms and to protect the entrenched interest of the current advertising behemoths.

⁵⁵ [http://vbn.aau.dk/en/persons/samant-khajuria\(5949159a-9dd1-42bc-8a4f-32a15405f7ef\)/publications.html](http://vbn.aau.dk/en/persons/samant-khajuria(5949159a-9dd1-42bc-8a4f-32a15405f7ef)/publications.html) <http://wayf.dk/>

⁵⁶ Stigler, George. “The Theory of Economic Regulation”. *The Bell Journal of Economics and Management Science*, 1971. <http://www.rasmusen.org/zg604/readings/Stigler.1971.pdf>

⁵⁷ Tullock, Gordon (1980), "Efficient rent-seeking", in Buchanan, J.; Tollison, R.; and Tullock, G., *Toward a theory of the rent-seeking society*, College Station: Texas A&M Press, pp. 97–112

⁵⁸ <http://www.commerce.senate.gov/public/index.cfm/hearings?ID=7BA9CC4E-3CD8-44DD-BB84-FED5F6309AB2>

⁵⁹ <https://www.publicknowledge.org/documents/protecting-privacy-promoting-competition-white-paper>

⁶⁰ <https://www.newamerica.org/oti/policy-papers/the-fccs-role-in-protecting-online-privacy/>

⁶¹ Swire, Peter. “Online Privacy and ISPs: ISP Access Is Limited and Less Accessed than Others”. February 29, 2016. <http://peterswire.net/wp-content/uploads/Online-Privacy-and-ISPs.pdf>

Broadband providers' sponsored data products provide users more transparent, secure, and private interactions than the current paradigm of profile based pay per click advertising. Sponsored data products also help reduce the cost of broadband subscriptions, something valued by all subscribers but particularly important to people of low income. In addition small and medium-sized enterprises can take advantage of these products because they do not require technical expertise or a large budget.

The proposed privacy rules create untenable regulatory asymmetry and distortion, put consumers at risk for confusion and misinformation, and deter much needed competition and innovation in ad serving technology. The proposed regulations should not be supported.